

SUBCHAPTER 1231

EMPLOYMENT OF FOREIGN NATIONALS

TABLE OF CONTENTS

SECTIONS

Page

A. Purpose	1231-1
B. Applicability and Scope	1231-1
C. Policy	1231-2
D. Procedures	1231-2
E. Delegations	1231-9

SUBCHAPTER 1231

EMPLOYMENT OF FOREIGN NATIONALS

- References:**
- (a) DoD Directive 1400.25, "DoD Civilian Personnel Management System," November 25, 1996
 - (b) DoD Instruction 1400.10, "Employment of Foreign Nationals in Foreign Areas," December 5, 1980 (hereby canceled)
 - (c) Department of State/Department of Defense Agreement, Subject: "Agreement Concerning Joint Compensation Plans for Local Employees of the Department of State -- United States Information Agency -- Agency for International Development -- Certain Designated Units of the Department of Defense -- and the Foreign Agriculture Service and other Designated Units of the Department of Agriculture," July 9, 1977
 - (d) DoD Directive 5530.3, "International Agreements," June 11, 1987
 - (e) DoD Manual 1416.8, "Department of Defense Foreign National Compensation Manual," January 1990
 - (f) The Foreign Service Act of 1980, as amended, 22 United States Code 3901 *et seq.*
 - (g) DoD Directive 5120.39, "Department of Defense Wage Fixing Authority - Appropriated Fund Compensation," April 24, 1980
 - (h) DoD Directive 5120.42, "Department of Defense Wage Fixing Authority - Nonappropriated Fund Compensation Programs," May 19, 1977

A. PURPOSE

This Subchapter:

1. Implements the Department of Defense (DoD) policy under DoD Directive 1400.25 (reference (a)) to prescribe procedures and delegations for the employment of foreign nationals in foreign areas, and sets forth the principles to follow when the U.S. Forces in foreign areas are negotiating for the employment of foreign nationals, and
2. Cancels DoD Instruction 1400.10 (reference (b)).

B. APPLICABILITY AND SCOPE

This Subchapter applies to the Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Defense Agencies, and the DoD field activities. This policy does not apply to the Civilian Marine Personnel of the Military Sealift Command, to foreign national employees serviced by U.S. Embassies in accordance with the State Department and DoD Agreement (reference (c)), or to foreign national employees in Panama.

C. **POLICY**

It is DoD policy under DoD Directive 1400.25 (reference (a)) that:

1. The establishment or use of military bases and facilities in the territory of another nation is normally governed by the provisions of a treaty or other formal agreement. Such a treaty or agreement usually addresses the subject of employment of foreign nationals.
2. The negotiation of basic arrangements with the host government of a foreign country is the responsibility of the Department of State, based on guidance and technical advice provided by the DoD. This guidance ensures that the employment system adopted is consistent with applicable laws and regulations and gives the local military command a workforce that is as stable, efficient, and economical as local conditions allow.
3. Treaties or agreements of this kind, negotiated at diplomatic levels, are usually written in broad terms. In the field of foreign national hire, inclusion in the treaty or agreement of only the most basic terms of reference is sufficient. Examples of basic terms of reference for employment of foreign nationals are in subsection D.1., below.
4. In conjunction with the formal agreement or treaty and its implementing arrangements, the DoD requires that a specific official or agency of the host government be designated as an official contact with the U.S. Forces on all labor matters.

D. **PROCEDURES**

1. **Basic Principles**. Although the rules of foreign national employment systems may vary based on negotiated agreements, the system for any foreign country shall satisfy these basic principles:

a. Prevailing practices, local laws, and customs shall be followed in the employment and administration of foreign nationals when the practices, laws, and customs are not in conflict with U.S. law, applicable treaties, international agreements, or other higher level agreements, and are compatible with the basic management needs of the U.S. Forces.

b. To reduce the need to import workers into the host country, foreign nationals shall be employed as extensively as possible by the U.S. Forces, consistent with any agreement with the host country and the DoD family member hiring policies.

c. The provisions of the foreign national employment system in a foreign country shall apply uniformly to all elements of the U.S. Forces.

2. **Employment Systems**. Foreign national employment systems in foreign countries fall into two general categories: those where the employees are hired directly by the U.S. Forces as employees of the U.S. Government (direct hire); and those where the personnel

are employees of the host government and are assigned to work with the U.S. Forces on a reimbursable cost or other financial basis (indirect hire).

a. **Direct Hire**. Under the direct hire system, the U.S. Forces are the legal employer of the foreign nationals and assume responsibility for all administrative and management functions with foreign national employment. The presence of one or more of these conditions may influence a decision to use direct hire:

(1) The host government has no objection to a direct hire system.

(2) The numbers of persons to be employed will have little or no effect on the local economy and do not warrant long and costly negotiation and preparation for an indirect hire arrangement.

(3) The provisions of a treaty or host-country agreement provide the U.S. Forces with the legal authority to employ foreign nationals and to follow local law and customs when possible.

(4) The host government does not desire or is unable to discharge the responsibilities inherent in an indirect hire system.

b. **Indirect Hire**. The host government serves as the legal employer of U.S. Forces' foreign nationals. Although the host government is the official employer of the foreign national personnel, it grants operational control to the U.S. Forces for the day-to-day management of such personnel. Conditions that may influence a decision to use this system are:

(1) The host government is desirous and capable of discharging the responsibilities inherent in an indirect hire agreement.

(2) A large number of employees will be required for a limited time, which may result in a disruption in the local labor market when the employees' services are no longer required.

(3) Direct hire of foreign nationals will disrupt the local market, and the host government is in the best position to cope with the situation.

(4) The host government funds a part or all the foreign national employment costs.

3. **Subsidiary Agreements**. A basic agreement or treaty provides the general terms of reference for the formulation of a more detailed operating agreement or arrangement. The subsidiary agreement should provide as complete and detailed coverage of all aspects of the management and administration of foreign national personnel as the U.S. laws and

local situation permits. Negotiation of all subsidiary agreements is subject to DoD Directive 5530.3 (reference (d)). Subjects that may be covered include:

a. **Responsibility for Recruitment**

(1) **Direct Hires**. In the case of direct hires, the responsibility for recruitment should be vested in the U.S. Forces. However, the agreement may provide for assistance from the host government through its existing facilities. This can take the form of a host government's assistance in obtaining qualified applicants and referring them to the U.S. Forces for selection. In such cases, the U.S. Forces keep the management right to decide the number of employees needed and to accept or reject any applicant so referred for a position.

(2) **Indirect Hires**. Usually, the host government, through its existing facilities, is responsible for recruiting civilian workers. The host government refers qualified applicants to the U.S. Forces for selection. The U.S. Forces have the right to accept or reject any applicant so referred. Additionally, the U.S. Forces should be permitted, with the consent of the host government, to recruit qualified personnel.

b. **Security Measures**

(1) The U.S. Forces must take measures to protect their security. The agreement shall provide for appropriate investigative requirements for the employment of foreign nationals in accordance with DoD regulations on security requirements for U.S. Government employment or for access to classified defense information.

(2) The agreement shall provide that no person may be employed by the U.S. Forces if the employment is inconsistent with the interests of national security. The U.S. Forces shall be authorized to effect the release of any foreign national who is considered to be a security risk, as long as the person is fairly treated.

(3) Since the discharge of foreign nationals on the grounds of security may cause grievances and labor unrest, carefully devised procedures shall be instituted to ensure there is no misuse of this authority.

c. **Priority Accorded U.S. Forces in Labor Market**. When it is necessary to establish priorities, the U.S. Forces shall be given the same priority as that of the armed forces or essential industry of the host country, particularly if the U.S. Forces are participating in the defense of the area or are an ally of the host country.

d. **Host Government Control on Personnel Requirements**. The U.S. Forces keep the management right to decide personnel levels. U.S. Forces should avoid host country control on personnel requirements, unless a valid reason for such control exists, such as:

- (1) A shortage of qualified personnel in the labor market.
- (2) Protection of the local economy from disruption caused by the U.S. Forces absorbing a disproportionate share of available labor.
- (3) An emergency condition exists.
- (4) The host country funds a part or all the foreign national employment costs.

e. **Importation of Workers.** The U.S. Forces should not import workers from a third country into a host country when personnel requirements can be satisfied by local labor. If personnel needs in any occupational category cannot be satisfied, arrangements should be made with the host government to allow importation of workers from other countries who are acceptable to the host government in the skills and numbers required. The host government should be asked to issue such workers the necessary documentation for residence or working permits. A periodic assessment shall be made of the need for continuing to employ third country nationals.

f. **Employment Conditions.** Local nationals shall be afforded conditions of employment that are based on prevailing practices, local law, and customs and are generally equal to those enjoyed by persons with similar skills and in similar occupations in the general economy of the host country. Employment conditions offered shall be favorable enough to meet existing fair standards in the labor market, but not so helpful as to create a privileged group within the country. Alternate provisions may be necessary when prevailing practices are inconsistent with local laws or in instances where U.S. laws or operational requirements of the U.S. Forces make adherence to prevailing practices, local law, and customs impossible or difficult. For example, payment made to foreign national employees, subject to base closures, should be balanced between host country provisions and payments provided to U.S. civilians in similar circumstances.

g. **Employee Compensation.** In the daily operations of a civilian personnel program, changing conditions may cause changes in wage scales, wage schedules, wage rates, and, to a lesser degree, employment conditions. U.S. Forces must comply with statutory limitations when they are placed on annual salary adjustments. When an indirect hire system is adopted, it is usually beneficial to have the employment conditions and the procedures for developing the wage and salary schedules written as a supplement to the subsidiary agreement. The subsidiary agreement can then provide for any changes in the supplement that are required through mutual agreement without renegotiating a new agreement. The preferred methodology is described in DoD 1416.8-M (reference (e)).

(1) In the case of direct hires, it is customary to use either variations of the classification and grading systems used for U.S. employees or those systems used locally, and to decide wage and salary schedules based on local prevailing rates. Complete

authority to decide the grade, classification, and pay for positions and to assign employees to such positions shall be vested in the U.S. Forces.

(2) When an indirect hire system is adopted, pay plans, to include job criteria and wage and salary schedules, shall show prevailing practices in the general economy to the greatest extent possible, and shall be compatible with U.S. Forces special requirements and personnel use practices. Differences between conditions of employment, allowances, and fringe benefits prevailing in the general economy and those afforded foreign national personnel of the U.S. Forces shall be considered in establishing foreign national pay schedules. Depending on existing bilateral agreements, contractual agreements on pay plans may be concluded by the U.S. Forces or their delegated representative with the host government, or by the host government with trade unions or other employee representative groups, subject to the concurrence of the U.S. Forces. U.S. Forces shall decide the proper classification and pay rate under existing pay plans for each employee.

h. **Social Security Coverage**

(1) Unless local conditions dictate otherwise, foreign nationals shall be covered under the existing social security program of the host government.

(2) In the case of direct hire employees, there is, at present, no legal authority for the U.S. Government to pay the employer's share of the social security contribution, unless the treaty or subsidiary agreement so provides. When either the direct hire or the indirect hire system is used, the treaty or subsidiary agreement should provide that foreign nationals will or will not be covered by the existing social insurance and worker's compensation benefits of the host country. When employees are so covered, the employer's contribution to social insurance will be made by the U.S. Forces, either directly or by reimbursement to the host government.

i. **Complaints.** On matters of an existing arrangement within the U.S. Forces' areas of responsibility, the U.S. Forces shall establish adequate procedures, appropriate to the local situation, to deal directly with complaints. The host government should receive complaints that fall within the area of its responsibility, as well as suggestions for changes to the agreement between the host government and U.S. Forces.

j. **Labor-Management Relations.** The basic principles set forth in paragraph D.1.a., above, apply to labor-management relations and to other aspects of employment. Policies governing the relationship between the U.S. Forces and the organization(s) representing their local national employees, including dispute-resolution procedures and, where appropriate, those matters subject to collective bargaining, shall be set forth in the agreement with the host government. When possible, particularly in those countries where government employees are not permitted to strike, an explicit statement shall be sought to the effect that foreign national employees do not have the right to strike against the U.S. Forces.

k. **Administrative Costs.** A method of determining the administrative costs incurred by the host government in providing personnel and in assuming certain administrative responsibilities under an indirect hire system should be developed. The extent to which these costs will be borne by the U.S. Forces, the manner in which payments for any assessed costs will be made by the U.S. Forces, and the extent to which it may be mutually desirable for the U.S. Forces to audit expenditures for administrative costs should be agreed on.

4. **Division of Responsibilities.** The recommendations contained in paragraphs D.3.a. through D.3.k., above, as they relate to the indirect hire system, envision an arrangement by which the host government assumes the status of employer, employs the personnel, performs certain administrative functions, and furnishes the personnel to the U.S. Forces on a reimbursable basis. In a system of this type, the host government and the U.S. Forces each have certain responsibilities and functions. The recommended division of the more important of these, if agreed on, must be delineated in the subsidiary agreement, as follows:

a. **Host Government**

- (1) Recruitment of personnel and referral of qualified applicants to U.S. Forces for selection.
- (2) Appointment of those applicants who are selected.
- (3) Maintenance of personnel records.
- (4) Preparation of payrolls and paying of personnel.
- (5) Completion of personnel actions requested by the U.S. Forces, such as promotions, transfers, or separations.
- (6) Negotiations with labor organizations. In areas of agreed U.S. Forces responsibilities and in matters about to the provisions of the basic treaty and subsidiary agreement, no binding obligation should be concluded in any negotiation between the host government and the labor organizations without concurrence of the U.S. Forces.

b. **U.S. Forces**

- (1) Establishment of number and types of positions required, and transmittal of requests for personnel to host government.
- (2) Determination of the proper classification of individual positions within an established wage and salary structure.
- (3) Determination of the amount of increase to the wage schedule.

- (4) Selection of personnel from applicants referred by the host government.
- (5) Submission of time and attendance reports to the host government's agency preparing the payrolls.
- (6) Assignment, supervision, control, and training of personnel.
- (7) Determination of promotions, demotions, transfers, and separations.
- (8) Audit of payrolls prepared by host government.
- (9) Consultation with employee associations or labor organizations.

5. **Joint Committees.** Combatant Command Commanders-in-Chief (CINC), or equal for the area, shall establish joint personnel committees with DoD Component representation as applicable to the situation. The Combatant Command CINC may decide the number of joint committees or subcommittees necessary for the conduct of orderly business. Committees may be established on an area or country basis. Component representatives (not to exceed one on a joint committee or subcommittee) shall be appointed by their respective DoD Component Commanders. For each such joint committee, a chairperson shall be designated by the Combatant Command CINC. CINCs and joint committees shall afford full consideration to the participation, wherever appropriate, of other parties, such as other allied forces or U.S. Government departments or agencies, in achieving a unified position to prevent unilateral action inconsistent with controlling treaties, agreements, or directives. The joint committees shall operate under the CINC of the Combatant Command who shall seek to resolve Component differences to achieve a unified U.S. Forces position.

a. For direct hire employees (paid from either appropriated or nonappropriated funds), the joint committees shall seek to establish a uniform position on salaries, wages, fringe benefits, and other terms of employment for foreign national employees. The terms of employment established shall be in accordance with the provisions of controlling treaties, administrative and labor management agreements, and this Subchapter. Negotiations with labor organizations shall not extend to such areas of discretion and policy as mission, budget, security, organization and assignment of personnel, the technology of performing work, or schedules of compensation, except to the extent provided by treaty, agreement, or directive. Labor organizations may be permitted to take part in the planning and conduct of area wage surveys.

b. For indirect hire employees, the joint committees shall be responsible for coordinating negotiations with officials from host governments and for ensuring the uniform application of agreed Service positions.

c. Procedures and detailed instructions to be followed in the administration of that part of the personnel program for foreign national employees of the U.S. Forces concerned with compensation are in the DoD 1416.8-M (reference (e)).

E. **DELEGATIONS**

1. The basis for setting pay for foreign national employees is Section 408 of the Foreign Service Act of 1980 (reference (f)).

2. In accordance with the provisions of DoD Directive 5120.39 (reference (g)) and DoD Directive 5120.42 (reference (h)), authority is delegated to each Military Department for redelegation to its Service Component Commander in each of these areas who shall exercise authority in that area jointly to establish salaries, wages, fringe benefits, related compensation items, and other terms of employment for foreign national employees:

- a. U.S. European Command
- b. U.S. Pacific Command
- c. U.S. Atlantic Command
- d. U.S. Central Command
- e. Ottawa (Defense Logistics Agency activities)

f. Compensation in all other areas, except Panama, will be set and adjusted by the Civilian Personnel Management Service.

3. Limitations on delegations of authority are:

a. Unresolved differences about terms of employment, salaries, wages, fringe benefits, and related compensation matters for foreign national employees shall be referred by the cognizant CINC to the Assistant Secretary of Defense (Force Management Policy (ASD(FMP))).

b. Situations, which in the view of Service Component commands, warrant deviation from prevailing practice, sometimes referred to as public interest determinations, shall be forwarded by the responsible CINC to the ASD(FMP). The public interest determination is not an option to waive Congressionally imposed budget limitations on annual adjustments.

c. The annual total pay for an individual established under the delegated authorities may not be more than the maximum payable rate for Executive Level IV.